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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

C. ITOH & COMPANY (AMERICA) INC.,

Petitioner,

v.

MICHAEL E. SPIESS, JACK K. HARDY, AND BENJAMIN F. ROUNTREE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the right of Japanese companies to engage managerial personnel of their choice, which is guaranteed by the 1953 Treaty of Friendship, Commerce & Navigation between the United States and Japan, has been abrogated or limited by Title VII or 42 U.S.C § 1981?

2. Whether a wholly owned United States incorporated subsidiary of a Japanese company has standing to assert the protections of the Treaty on behalf of its parent company?

3. Whether the Court of Appeals improperly dismissed this case for want of jurisdiction, after the Supreme Court had remanded the case for further consideration in light of *Sumitomo Shoji America Inc.* v. *Avagliano*?

4. Whether the Court of Appeals improperly held that the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.* did not provide a basis for appellate jurisdiction in this case?

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No. .....

In The

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October Term, 1983

C. Itoh & Company (America) Inc.,

Petitioner,

v.

Michael E. Spiess, Jack K. Hardy, and
Benjamin F. Rountree,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

C. Itoh & Co. (America) Inc. (hereinafter referred to as "C. Itoh" or "Petitioner"), respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 725 F.2d 970 (5th Cir. 1984) (Appendix A, reprinted in the separate Appendix). The order of the district court is not officially reported but is reprinted herein (App. B). The order of the Court of Appeals on remand from the Supreme Court is reported at 687 F.2d 129 (5th Cir. 1983) (App. C). The order of the Supreme Court granting certiorari and remanding the case for further consideration is reported at 457 U.S. 1128 (1982) (App. D). The earlier opinion of the Court of Appeals is reported at 643 F.2d 353 (5th Cir. 1981) (App. E). The initial opinion of the District Court is reported at 469 F.Supp. 1 (S.D. Tex. 1979) (App. F).

JURISDICTION

The judgment of the Court of Appeals was entered on February 10, 1984. A Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on March 8, 1984 (App. G). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

TREATY AND STATUTES INVOLVED

This case involves the Treaty of Friendship, Commerce & Navigation between the United States and Japan, [1953] 4 U.S.T. 2063, T.I.A.S. No. 2863 (hereinafter referred to as the "Treaty"); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976) (hereinafter referred to as "Title VII"); 42 U.S.C. § 1981 (1976) (hereinafter referred to as "Section 1981"); and the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.* (1976). Relevant portions of the Treaty and the statutes are reprinted in Appendix H.

STATEMENT OF THE CASE

1. Legal and Factual Background.

The 1953 Treaty of Friendship, Commerce & Navigation between the United States and Japan establishes the basic framework for economic and trade relations between these two countries. Among the most important rights conferred by this Treaty is the staffing privilege contained in Article VIII(1):

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice*.

4 U.S.T. at 2070 (emphasis supplied). Article VIII(1) is the corollary to the fundamental right of Japanese corporations to organize, manage and control enterprises they have established or acquired in the United States, which is guaranteed by Article VII(1) of the Treaty.

This Treaty right of freedom of choice in the selection of managerial personnel abroad facilitates home office control of foreign investments and operations. It also fosters international commerce by eliminating the artificial barriers sometimes created by so-called "percentile" legislation, that is laws requiring the employment of at least a certain percentage of local nationals in foreign-owned businesses. These Treaty provisions were included at the insistence of the United States in order to benefit American companies seeking to do business abroad. *See Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 181 n. 6 (1982).

The staffing rights of Article VIII are effectuated through Article I of the Treaty and Section 101(a)(15)(E) of the Immigration and Nationality Act, which permit the immigration into the United States of managerial personnel (termed "treaty traders" or "treaty investors") for the purpose of carrying on trade and engaging in related commercial activities between the two countries.

C. Itoh & Co. Ltd. is a Japanese general trading company ("sogo shosha") engaged in substantial international trade between the United States and Japan. Operating under the protection of these Treaty rights, C. Itoh & Co. Ltd. ("C. Itoh Japan") manages and controls its wholly owned subsidiary C. Itoh & Co. (America) Inc., a New York corporation. C. Itoh's principal commercial activity involves arranging for the import to the United States of Japanese produced goods and services and the export to Japan of United States produced goods and services. Through its knowledge of the nature and needs of Japanese business, C. Itoh seeks to represent Japanese industry involved in trade between Japan and the United States. C. Itoh is one of numerous subsidiaries and affiliates controlled by C. Itoh Japan throughout the world. C. Itoh functions as one component of a global trading system coordinated by its parent corporation in Tokyo.

This world-wide integration of operations is achieved primarily through the assignment of Japanese nationals from the parent company to its overseas subsidiaries and affiliates for purposes of management and control. Thus, C. Itoh's managerial structure is composed largely of C. Itoh Japan employees assigned to C. Itoh by the parent company for a limited period of time. These "Japan staff" personnel enter the United States as non-immigrant "treaty traders" under the provisions of the Immigration and Nationality Act of 1952. 8 U.S.C. § 1101(a)(15)(E)(i) (1976). As a general rule, C. Itoh's Japanese managerial personnel remain in the United States for periods of between three and five years before returning to Japan to resume duties with the parent company. C. Itoh Japan's practice of rotating its Japan staff is similar to that of other Japanese trading companies operating in the United States, such as Sumitomo.

2. **Course of Proceedings Below.**

This is an employment discrimination class action brought pursuant to Title VII and 42 U.S.C. § 1981. Plaintiffs are white American citizens alleging discrimination by C. Itoh in the staffing of its management level positions with Japanese nationals and the exclusion of Plaintiffs from those management positions. More specifically, Plaintiffs claim that C. Itoh has violated Title VII and Section 1981 by its failure to train and promote them to management level positions and its failure to provide them with management level compensation and other terms and conditions of employment. A nationwide class of past, present and future employees who are non-Oriental, non-yellow color, and non-Japanese has been certified under Rule 23 by the district court.

Defendant moved under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint for failure to state a claim upon which relief can be granted, relying on the protection of the 1953 FCN Treaty, particularly the staffing privileges contained in Article VIII(1). The district court denied this Motion

to Dismiss, concluding that C. Itoh was a company of the United States, not of Japan, under the definition contained in Article XXII(3) of the Treaty, and hence could not avail itself of the rights provided by Article VIII(1), notwithstanding that it was the wholly owned subsidiary of an admittedly Japanese company. *Spiess* v. *C. Itoh & Co. (America), Inc.*, 469 F.Supp. 1 (S.D. Tex. 1979) (App. F). The district court also ruled that, even if C. Itoh had standing to raise the Treaty rights of its parent, a question which it did not reach, this would not provide a defense since the hiring practices at issue were those of C. Itoh and not those of the parent company. Recognizing the novelty and importance of the issues presented, however, the district court certified the case for interlocutory appeal to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1292(b) (1976).

The Fifth Circuit accepted the appeal and reversed, holding that C. Itoh was a company of Japan under the Treaty and entitled to assert in its own behalf all Treaty rights granted to companies of either Party, including those of Article VIII(1). On the substantive issue whether Title VII or Section 1981 had abrogated the unqualified Treaty right of Japanese companies to engage managerial personnel "of their choice," the court of appeals concluded that Article VIII(1) of the Treaty conferred an absolute employment right:

> It is apparent that article VIII(1)'s "of their choice" provision was intended, not to guarantee national treatment, but to create an absolute rule permitting foreign nationals to control their overseas investments. . . . Considering the Treaty as a whole, the only reasonable interpretation is that article VIII(1) means exactly what it says: Companies have a right to decide which executives and technicians will manage their investment in the host country, without regard to host country laws.

643 F.2d at 360-61 (App. E).

According to the Fifth Circuit, Article VIII(1) was "based on the principle of home office control of the foreign investment." *Id.* at 362 n. 8. The reciprocal obligations found in Article VIII were designed to preclude any local legislation that might interfere with this principle of home office control:

> Clearly, Article VIII(1) provides some right to Japanese companies to manage their own affairs. It is irrelevant whether the source of potential interference with that right is state legislation characterized as "ultranationalistic" or a federal statute labeled "progressive." *The right of Japanese companies to choose essential personnel is a right to maintain Japanese control of their overseas investment.* To make this right subject to Title VII's bfoq requirements, or to interpret it to override only state law, would render its inclusion in the Treaty virtually meaningless. Thus, we hold that the Article VIII(1) "of their choice" provision permits Japanese companies to discriminate in favor of their fellow citizens.

Id. at 362 (emphasis supplied). Since the Fifth Circuit held that C. Itoh was entitled to assert, in its own right, the protection of Article VIII(1), that court did not reach the issues of whether C. Itoh had standing to raise the Treaty rights of its parent, whether the parent's Treaty rights extended to staffing of the subsidiary, or whether the challenged employment practices were those of the parent or the subsidiary. The Fifth Circuit accordingly reversed and remanded the case to the district court with directions to dismiss.

Subsequently, this Court held that a corporation incorporated in the United States was not a company of Japan under the Treaty and was not entitled to assert in its own right the protection of Article VIII(1) in defense to a Title VII suit, notwithstanding it was the wholly owned subsidiary of an admittedly Japanese company. *Sumitomo Shoji America, Inc.* v. *Avagliano,* 457 U.S. 176 (1982). This Court's decision was extremely narrow, however. It did not resolve the question of the impact of Title VII on Treaty-based staffing privileges, nor did it preclude

the possibility that subsidiaries of Japanese companies could assert Treaty rights on behalf of their parent companies. In a concluding footnote, this Court observed, "We also express no view as to whether Sumitomo [the defendant subsidiary] may assert any Article VIII(1) rights of its parent." *Id.* at 189 n. 19.

Thereafter, this Court granted the Plaintiffs' petition for certiorari in this case, vacated the judgment of the Fifth Circuit and remanded the case to the Fifth Circuit "for further consideration in light of *Sumitomo Shoji America, Inc.* v. *Avagliano*. . . ." *Spiess* v. *C. Itoh & Co. (America), Inc.*, 457 U.S. 1128 (1982) (App. D).

Following the remand, the Fifth Circuit reopened the appeal and directed the parties to file memoranda regarding further action necessary to comply with this Court's mandate. Both parties urged the court of appeals to consider the remaining issues in the Motion to Dismiss which were left open by this Court in *Sumitomo*. However, the Fifth Circuit declined to do so without first remanding the matter to the district court for further factual findings. The pertinent portion of the Fifth Circuit's order states:

> The parties urge this court to consider the remaining issues in the case. We decline to do so without first remanding the matter to the district court.
>
> C. Itoh presents several grounds for its Motion to Dismiss. For example, it argues that it has standing to assert the substantive Treaty rights of its parent company. Resolution of these remaining issues may involve several factual determinations that have not yet been made. Therefore, we have determined that no decision should be made by this court at this time. We remand the cause to the district court with directions to conduct further proceedings to finalize the action in light of the mandate of the Supreme Court.

687 F.2d 129 (5th Cir. 1983) (App. C).

The district court on remand refused to make any further factual findings. Instead, that court simply referred to its initial

decision (469 F.Supp. 1) and held that since C. Itoh could not assert Treaty rights directly in its own behalf, it could not assert Treaty rights indirectly by invoking the Treaty rights of its parent. Thus, the district court ruled as a matter of law that C. Itoh had no standing to claim the protection of Article VIII(1) on behalf of its parent company. The district court entered its order denying C. Itoh's Motion to Dismiss in its entirety on September 27, 1983 (App. B).

C. Itoh thereafter sought to bring its Motion to Dismiss before the Fifth Circuit in order that that court could fulfill its mandate from the Supreme Court to reconsider the case. Instead of carrying out the Supreme Court's instructions, however, a motions panel of the Fifth Circuit *sua sponte* dismissed the appeal for want of jurisdiction. 725 F.2d 970 (1984) (App. A).

In its opinion the Fifth Circuit panel briefly discussed and rejected C. Itoh's assertion of the court's continued jurisdiction by virtue of the earlier appellate proceedings in the case. The motions panel acknowledged, however, that they had "difficulty in understanding just what particular legal theory of appealability appellant intends to advance thereby." 725 F.2d at 975. This was not surprising, inasmuch as the panel was ruling on an issue which none of the parties had contested and which neither side had been requested or given the opportunity to brief. Moreover, none of the judges on the motions panel had participated in the earlier decision on the merits or in the decision to remand following this Court's action.

The Fifth Circuit panel also considered and rejected C. Itoh's alternative jurisdictional argument grounded on the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). C. Itoh's Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied by the Court of Appeals on March 8, 1984 (App. G).

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Questions Concerning the Impact of Domestic Employment Laws Upon the International Treaty Obligations of the United States.

The Court's narrow holding in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), left unresolved critical legal issues arising from the conflict of domestic employment laws with antecedent treaty obligations of the United States.[1] Certiorari had been granted in *Sumitomo* to resolve what appeared to be a clash of two national policies of the highest priority, that is, Treaty commitments basic to American international commerce and federal employment discrimination laws. Instead, the Court disposed of the case on a narrow point of Treaty interpretation, bypassing the larger question of the impact of U.S. employment discrimination laws on Japanese companies operating in this country by virtue of the protections and guarantees afforded by the FCN Treaty. In particular, the *Sumitomo* opinion avoided any discussion of whether the freedom of choice staffing privilege of Article VIII(1) was overridden or diminished by the prohibitions of Title VII and Section 1981. Another important issue left unresolved is whether and under what circumstances U.S. incorporated subsidiaries can assert on behalf of their Japanese parent companies, the Treaty rights which the latter admittedly possess. At the conclusion of its opinion in *Sumitomo*, this Court noted: "We also express no view as to whether Sumitomo may assert any Article VIII(1) rights of its parent." 457 U.S. at 190, n. 19 (1982).

The United States is presently a party to more than 130 FCN treaties. U.S. Dep't. of State, Commercial Treaty Programs of the United States 3 (1952). These treaties provide the basic legal framework for the conduct of commercial transactions between

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[1] *See generally Lewis & Ottley*, Title VII and Friendship, Commerce, and Navigation Treaties: Prognostications Based upon *Sumitomo Shoji*, 44 Ohio St. L. J. 45, 47-48, 90-91 (1983).

the United States and the rest of the world. In those treaties negotiated since World War II, the primary focus has been the protection and encouragement of companies doing business abroad, as well as the elimination of unnecessary artificial trade barriers, including host country employment laws. A major component of that protection is the right to unfettered selection of those persons who will manage and control the company's foreign investment. Most modern FCN treaties contain language substantially similar to that in the Japanese Treaty giving companies the right to engage specified personnel of their choice for purposes of management and control. *Sumitomo*, 457 U.S. at 182, n. 7. As this Court has already noted, the legal issues thus presented are "clearly of widespread importance." *Id.*

Until this Court resolves the questions raised but not decided in *Sumitomo*, foreign nationals and companies engaging in commercial enterprises within the United States must operate in an atmosphere of uncertainty and insecurity regarding their basic legal rights. Although the FCN treaties give them the absolute right to control and manage their U.S. enterprises, the primary means by which this control is accomplished, *i.e.* the staffing of the enterprise with its own managerial and technical personnel, has been hampered by the threatened application of domestic employment discrimination laws. Such laws have precisely the same effect on foreign companies as the percentile laws which the drafters of the FCN treaties sought to overcome. Prompt resolution of the competing national priorities represented by the Treaty and Title VII will benefit not only the parties before the Court in this litigation but also all foreign companies conducting business enterprises in the United States.[2]

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[2] This Court has already taken note at the fact that, as of 1979, U.S. affiliates of foreign corporations provide employment for over 1.6 million workers in this country. *Sumitomo*, 457 U.S. at 182 n. 7.

The reciprocal effect on U.S. companies doing business abroad, not only in Japan but also other countries with which the U.S. maintains an FCN treaty, should also be recognized. Until this Treaty question is authoritatively resolved, the Treaty staffing rights previously enjoyed by American companies abroad might well be jeopardized by local employment laws and regulations of foreign countries, which may look upon the decisions of lower American courts as solid precedent for undermining important Treaty rights.

This case provides the appropriate vehicle for this Court to resolve the remaining Treaty issues. Unlike *Sumitomo*, the parties have engaged in extensive discovery prior to the filing of the Motion to Dismiss, providing a sufficient factual record and basis for the Court's decision. Moreover, the issues of the subsidiary's relationship to its parent company and the subsidiary's standing to raise the parent's Treaty rights were raised in C. Itoh's original Motion to Dismiss and considered by the district court. 469 F.Supp. at 7-9. These issues have therefore been fully briefed and presented to the lower courts for their consideration. *Cf. Sumitomo*, 457 U.S. at 180 n. 4.

The district court rejected C. Itoh's claim that it was entitled to invoke the Treaty rights of its parent company on the ground that C. Itoh should not be allowed "to accomplish indirectly what it cannot accomplish directly" under Article VIII(1). *See* App. B. The district court therefore ruled that, as a matter of law and no matter how close the relationship between parent and subsidiary, the subsidiary cannot assert Treaty rights undeniably possessed by the parent company.

This conclusion is plainly incorrect as a matter of law. This Court has frequently recognized the standing of a litigant to assert the legal rights of a third party as a defense, especially when enforcement of the challenged restriction against the litigants would "preclude or otherwise adversely affect a relationship existing between them and the other persons whose rights

assertedly are violated." *Warth* v. *Seldin*, 422 U.S. 490, 510 (1975). *See also Carey* v. *Population Services Int'l*, 431 U.S. 678 (1977); *Craig* v. *Boren*, 429 U.S. 190 (1976); *Singleton* v. *Wulff*, 428 U.S. 106 (1976); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Barrows* v. *Jackson*, 346 U.S. 249 (1953); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Truax* v. *Raich*, 239 U.S. 33 (1915).

The record in this case clearly demonstrates C. Itoh is entitled to raise the Treaty rights of its parent company under the standards for third party standing articulated and applied by the Supreme Court. The integral relationship between C. Itoh and its parent company, as well as the control exercised by the parent over the employment practices at issue, ensures that C. Itoh is an appropriate and effective proponent of those rights.

Unless the parent's Treaty rights are asserted and protected here, they will be effectively destroyed. The right of C. Itoh Japan to engage executive and managerial personnel of its choice places these staffing decisions beyond the scope of scrutiny under Title VII or Section 1981. These Treaty rights would be emasculated if the parent's staffing policies and practices were subject to challenge under domestic employment law.

For these reasons, this Court should grant this Petition and settle the important legal issues left unresolved by its earlier decision in *Sumitomo*.

II. The Actions of the Fifth Circuit Have So Far Departed from the Accepted Course of Judicial Proceedings as to Call for Exercise of this Court's Power of Supervision.

The Fifth Circuit's actions following this Court's remand have deprived C. Itoh of the appellate ruling on its Motion to Dismiss which C. Itoh has been seeking since 1979. The questions raised herein were first certified and accepted for interlocutory appeal by the Fifth Circuit in that year. The favorable decision rendered by that court in 1981 was vacated and remanded by

this Court in 1982. The effect of the Supreme Court's action was to erase the Fifth Circuit's prior opinion and return the case to that court for decision. Thus it stood in precisely the same posture as before, except that the Court of Appeals now had the task of assessing the impact of the *Sumitomo* decision on its holding.[3]

Thus, when the Fifth Circuit received the case from the Supreme Court, the questions raised by C. Itoh's Motion to Dismiss were again before the Fifth Circuit for review under 28 U.S.C. § 1292. At that time, no less than on the initial appeal, the Fifth Circuit was obligated to render a decision on those issues.

Rather than doing so, however, the Fifth Circuit remanded the case to the district court, stating that additional findings might be appropriate to resolve the remaining issues of the Motion to Dismiss. The language of the order sending the case to the district court clearly contemplated that the remand was an interim measure for the limited purpose of facilitating appellate review. The court declined to consider the remaining issues "without *first* remanding the motion to the district court." 687 F.2d 129 (emphasis supplied). Since additional factual findings might be necessary to resolve those issues, the court "determined that no decision should be made by this court *at this time*." *Id.* Finally, the closing sentence directed the district court "to conduct further proceedings to finalize the action *in light of the mandate of the Supreme Court*." *Id.* Since the "mandate of the Supreme Court" was for the Fifth Circuit to give further consideration to the appeal in light of *Sumitomo*, there seemed little

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[3] Of course, the fact that this Court vacated the earlier decision of the Fifth Circuit and remanded for further consideration does not justify any inference regarding this Court's view of the merits of the case. *See United States* v. *National Soc. of Professional Engineers*, 555 F.2d 978, 982 (D.C. Cir. 1977).

doubt that the remand was for the limited purpose of supplementing the record to enable the court of appeals to carry out the command of this Court.

The district court (with the Plaintiffs' concurrence) found that no additional findings of fact were necessary to dispose of the motion. The district court then reiterated its earlier ruling that, as a matter of law, C. Itoh could not assert, on its parent company's behalf, the protection of Treaty rights undeniably possessed by the parent.

Rather than completing its review, the Fifth Circuit refused to hear C. Itoh's appeal from the district court's order. In so doing, the Fifth Circuit has left undecided the appeal over which it accepted jurisdiction years ago. While it may be true that courts of appeals initially have discretion whether to accept appeals under Section 1292, it is suggested that the rules do not permit a court to refuse to decide a case once jurisdiction has been accepted and exercised.[4]

Since there has been no appellate decision on the original Section 1292(b) appeal, and since the Fifth Circuit has not revoked its initial certification of the Treaty question, it must be concluded that that appeal remains open. Thus, it is not a question of whether the earlier Section 1292(b) certification "carries over" from the district court's 1979 ruling to that court's identical 1983 ruling, as the Fifth Circuit characterized the issue. 725 F.2d at 975. The issues raised in the initial 1292(b) certification have yet to be resolved by the court of appeals. Thus the case before the Fifth Circuit was the same as that originally certified, and not a separate new appeal.

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[4] While it may be possible for a court of appeals to reverse its initial decision to accept a Section 1292 appeal on the grounds that it had been "improvidently granted," the Fifth Circuit has never so revoked its initial Section 1292 certification. While there are instances of this in the context of Supreme Court certiorari decisions, Petitioner is unaware of any such holdings by courts of appeal in the context at issue.

A fundamental flaw in the Fifth Circuit's analysis is its apparent assumption that the 1292(b) certification attached to review of a particular order of the trial court, rather than the underlying legal questions themselves. The question initially certified for appeal made no reference to the district court's order. It was concerned instead with the substantive issues of the subsidiary's ability to invoke the protection of the Treaty. Therefore, the dismissal of the appeal cannot be justified on the technical grounds that the district court had issued another decision on the motion to dismiss, especially since the second order was at the Fifth Circuit's direction, involving the same controlling question of law and reaching the same result as in 1979.

Aside from the initial 1292(b) certification, this Court's order of remand to the Fifth Circuit provided a completely sufficient, independent basis for jurisdiction over this appeal. As the Court has repeatedly ruled, an appellate court has no warrant to question its own jurisdiction upon a remand from this Court:

> On receipt of the mandate it is the duty of the subordinate court to carry it into execution even though the jurisdiction do not appear in the pleadings.

Tyler v. *Magwire*, 84 U.S. (17 Wall.) 253, 283 (1873). In *Tyler*, the state court had refused to grant the equitable relief directed in this Court's mandate, instead dismissing the case on the grounds that equitable jurisdiction was lacking since there was a plain and adequate remedy at law. The Court reversed and rendered a decree in accordance with its earlier holding, declaring that state courts "have no power to deny the jurisdiction of this court in a case brought here for decision and sent back with the mandate of this court." 84 U.S. at 284.

While in *Tyler*, this Court's initial decision had completely disposed of the case on the merits, the same rule applies where this Court's decision has not totally disposed of the case and other issues remain to be considered on remand. In *Herrmann* v. *Brownell*, 274 F.2d 842 (9th Cir.), *cert. denied sub nom.*

Herrmann v. *Rogers*, 364 U.S. 821 (1960), the Supreme Court had remanded the case to the Ninth Circuit for reconsideration of a specific issue of Idaho property law. The Ninth Circuit on remand carefully explained the basis of its jurisdiction:

> When a case is appealed from this court to the Supreme Court, this court completely loses jurisdiction of the cause. Thereafter, our jurisdiction can be revived only upon the mandate of the Supreme Court itself, and even upon such restoration, the jurisdiction of this Court is rigidly limited to those points, and those points only, specifically consigned to our consideration by the Supreme Court.

274 F.2d at 843. *Cf. Sanders* v. *John Nuveen & Co.*, 554 F.2d 790 (7th Cir. 1977) (on remand for further consideration in light of an intervening Supreme Court decision, the court of appeals should consider not only the direct impact of the intervening decision on its prior holding, but also whether the prior holding can be sustained on alternative grounds).

The refusal of the Fifth Circuit to exercise its jurisdiction over this appeal and to execute the mandate of this Court is a substantial departure from the accepted and usual course of judicial proceedings, and has deprived C. Itoh of its right to due process of law. C. Itoh has pursued an appellate determination of important Treaty rights which are being threatened by the enforcement of U.S. domestic employment laws. The novelty and significance of the legal issues involved have been repeatedly recognized by the courts, and interlocutory appeal has been found appropriate to facilitate prompt resolution and guidance for other courts. By the Fifth Circuit's failure to rule on the merits of this appeal, C. Itoh has been denied the benefit of the judicial process to which it is entitled by virtue of both the special mandate of this Court and the ordinary rules of appellate procedure.

Additionally, there is a significant possibility of a much broader negative impact on the federal appellate process. The order of remand issued in this case — "remanded for further

consideration in light of" — is frequently used by this Court.[5] Presumably the purpose of such an order is to give lower appellate courts the opportunity to consider the effect of intervening Supreme Court decisions on cases presenting related questions of law, thereby securing the benefit of those courts' reasoned deliberations before presentation to this Court. Of course, this purpose is frustrated where, as here, the court of appeals abdicates its responsibility to reconsider the case.

By refusing to accept jurisdiction, the Fifth Circuit has acted as though this Court had reversed on the merits and remanded for trial or "further proceedings not inconsistent" with its opinion in *Sumitomo*. Petitioner suggests that, had the Court intended to issue such an order, it would have done so. In fact, orders of this type are also commonly issued by this Court; that was precisely the order which the Court issued in *Sumitomo*. *See* 457 U.S. at 189-90. It is difficult to envision that this Court intended that these two very different orders should have the same meaning.

The court of appeals has effectively obliterated any distinction between an order remanding "for further consideration in light of" and an order remanding "for further proceedings not inconsistent with this opinion." This inattention to the substantive language of this Court's mandate can only result in unnecessary confusion and uncertainty in the administration of the federal court system, thereby disserving the important interests of both the litigants and the judiciary itself. This Court has traditionally insisted upon scrupulous adherence to its mandates on the part of lower courts. *United States* v. *E. I. du Pont de Nemours and Co.*, 366 U.S. 316, 325 (1961); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Unless this Court takes action to enforce its earlier mandate, this Court's control over the orderly

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[5] Indeed, this same order was issued in seven other cases appearing in Volume 457 of the Supreme Court Reports alone.

processes of the federal appellate system could be undermined, much to the detriment of the efficient administration of justice.

III. The Holding of the Court of Appeals Improperly Restricts the Collateral Order Doctrine and is Directly Contrary to the Holdings of this Court in *Nixon* v. *Fitzgerald and Harlow* v. *Fitzgerald.*

The court of appeals' dismissal of this appeal for want of jurisdiction is directly contrary to recent decisions of this Court recognizing the appealability of certain interlocutory orders under the "collateral order" doctrine articulated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

For example, in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), a district court had denied the defendant's motion for summary judgment asserting absolute presidential immunity from a suit by an Air Force employee alleging unlawful termination in retaliation for his adverse testimony before a Congressional subcommittee. This Court held that such an order denying a claim for absolute immunity was properly appealable under the collateral order doctrine. *Nixon*, 457 U.S. at 472. In a companion case decided that same day, this Court ruled that district court's decision denying immunity to presidential aides was also immediately appealable under the *Cohen* criteria. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 813 n. 20 (1982).

In its holding below, the Fifth Circuit distinguished the *Nixon* case on the grounds that the type of immunity there asserted, *i.e.* absolute presidential immunity, was qualitatively different from the Treaty based immunity asserted by C. Itoh. According to the court of appeals, the purpose of presidential immunity "was not merely to immunize the [President] from punishment or liability but also to immunize him from *trial* seeking to impose such punishment or liability." 725 F.2d at 974 75 (emphasis in original). In the opinion of the court of appeals, the rights conferred by the Treaty were "not intended to confer immunity

from the litigation process as such," and therefore the case fell outside the supposed rationale of the *Nixon* case.

To the contrary, C. Itoh strongly urges that the Treaty rights at issue were clearly intended to confer an absolute immunity from trial in the first instance. The negotiating history of the Treaty plainly reflects the purpose to remove all artificial and unnecessary barriers to trade and commerce between the two countries. *See generally*, "Commercial Treaties — Treaties of Friendship, Commerce & Navigation with Israel, Ethiopia, Italy, Denmark, Finland, Germany, and Japan," *Hearings before the Subcomm. of the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. (1953). This purpose would be frustrated just as much by the expensive and time consuming litigation process as by the possibility of punishment or liability.

No authority was cited by the court of appeals in support of its restrictive interpretation of the scope of the Treaty-based immunity. In fact, the degree of protection afforded by these Treaty rights has yet to be authoritatively reviewed and determined by any federal appellate court. Ironically, the decision of the court of appeals effectively precludes the opportunity to obtain a prompt and thorough determination of these Treaty-based rights and immunities.

Even assuming *arguendo* that the court of appeals correctly assumed that the Treaty was intended to confer only a limited immunity from liability as opposed to immunity from trial, this distinction is immaterial for purposes of the collateral order doctrine. With regard to the appealability issue, the *Nixon* opinion did not turn on, nor even discuss, the distinction between immunity from trial (or absolute immunity) and immunity from liability (qualified immunity). Rather the Court emphasized the important and unsettled question of law presented by the President's claim of immunity. *Nixon*, 457 U.S. at 743.

Moreover, the *Harlow* decision conclusively refutes the Fifth Circuit's argument that the nature of the immunity involved

determines appealability under the collateral order doctrine. The Court in *Harlow* held that presidential aides have only qualified or good faith immunity from suits for damages. Thus, such aides are entitled only to immunity from liability, assuming they can demonstrate their objective good faith. Nevertheless, the Court found that the lower court's order denying summary judgment was immediately appealable, as in *Nixon*, under the collateral order doctrine. *Harlow*, 457 U.S. at 806 n. 11. In light of *Harlow*, therefore, the Fifth Circuit clearly erred in basing its jurisdictional decision on the nature of the immunity at issue.

For these reasons, Petitioner urges that a writ of certiorari be issued to review this important issue of federal appellate procedure which has been decided in conflict with applicable decisions of this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted. In view of the importance of the Treaty issue and the Court of Appeals' failure to carry out this Court's previous mandate, the Supreme Court should undertake to review not only the Court of Appeals' most recent decision dismissing the case on jurisdictional grounds, but also the holding of the district court on the substantive Treaty questions.

Respectfully submitted,

By .....

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CERTIFICATE OF SERVICE

I, Neil Martin, one of the attorneys for Petitioner C. Itoh & Company (America) Inc., do hereby certify that on this the 6th day of June, 1984, three (3) copies of the foregoing Petition were placed in the United States mail, postage prepaid, to the following counsel of record:

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